

VIRGINIA:

15 September 2003
TESTE: LILLIE M. HART, CLERK 3:59
By Bgr D.C.

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA

v.

LEE BOYD MALVO,

Defendant.

Case Nos. CR 03-3089, CR 03-3090 &
CR 03-3091

NOTICE AND MOTION FOR DISCLOSURE OF DISCOVERY MATERIALS:
DNA AND HANDWRITING ANALYSIS DOCUMENTS

COMES NOW the Accused, Lee Boyd Malvo, by counsel, and moves this court on September 17, 2003, at 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, to order the production of discovery materials relating to DNA and handwriting evidence, and in support thereof states as follows:

1. Upon motion of defense counsel, a Discovery and Inspection Order dated March 3, 2003 directs in pertinent part "... that the Commonwealth ... permit the Defendant to inspect, copy and/or photograph (2) all written reports ..., other scientific reports ..., or copies thereof, that are known to be within the custody and control of the Commonwealth"

2. Virginia Code § 9.1-121 states, in pertinent part:

Upon ... the request of an accused person's attorney, the Division of Forensic Science or the Division of Consolidated Laboratory Services shall furnish to the accused or his attorney the results of any investigation which has been conducted by it and which is related in any way to a crime for which the person

is accused.

3. In its order of March 21, 2003 requiring the timely disclosure of exculpatory evidence, this Court accepted the Commonwealth's stipulation (made at the request of the defense) that

... for the purposes of ... any discovery order of this Court, the

'Commonwealth' or the 'Commonwealth's Attorney' shall be deemed to

include any law enforcement agencies or prosecutors who are members of the

regional task force investigating the offenses with which the defendant has been charged.

4. On March 31, 2003 and June 6, 2003, this Court ordered the appointment of DNA and handwriting experts, respectively, to assist defense counsel in its preparations for trial.

5. With regard to these discovery mandates and clarifications, Defense counsel has received from the prosecution a number of documents that relate to the collection of samples from items related to this case that had were expected to have the presence of human DNA and documents that relate to the analysis of those samples. Some of these documents are ostensibly the type of "reports" referred to in the discovery disclosures mentioned above.

6. However, while the documents do reveal some information that could be described as results, they are significantly incomplete in providing a complete listing of the scientific process and results relating to the accumulation of DNA samples, and their testing.

7. Additionally, defense counsel has received a handwriting document or "report" for the analysis of a questioned document which gives no explanation as to where the document was recovered.

8. Defense counsel requested that the Commonwealth supply the missing information by a letter dated August 28, 2003 which set out in specific detail with precise references to the

laboratory sample numbers and cross references to Bates stamp numbers which appear on the bottom of the documents that were provided (see Exhibit 1 and 2; attached hereto). There has been no response to this letter.

9. To adequately prepare a constitutional defense, which for Sixth Amendment purposes includes the opportunity to competently cross examine the Commonwealth's expert witness, and to obtain potentially exculpatory information, it is absolutely necessary to have the information specified below regarding DNA in paragraphs 10 through 12 and regarding handwriting in paragraph 13.

10. There are a number of DNA results that have been obtained that correspond to samples that were obtained by "swabbings" and otherwise, for which there is no specific information provided as to exactly from where the swabbings or other samples were taken or found. Obviously, there can be no understanding or comprehension of the results of any "reports" thus far provided without these answers.

a) With regard to specimens K-7.1, K-7.3, K-7.4, K-7.5 and K-7.6, please advise from precisely where on the Bushmaster rifle these specimens originated (see Bates #s 307 and 308).

b) With regard to specimens Q-423 (swabbing) and Q-424 (swabbing), please advise precisely where at the arrest scene these specimens were obtained (see Bates # 310).

c) With regard to specimen Q-408, please describe what "glove" is referred to, where it was found, and by whom it was found (see Bates #s 326, 327).

d) With regard to the following specimens obtained from the Tasker School crime scene, Please advise as to who recovered it, and precisely where at the scene was it found Specimens Q-2 (Swab (S-1)); Q-3 (Swab (S-2)); Q-4 (Cigarette butt (CN-8)); Q-5

(Cigarette butt); **Q-6** (Cigarette butt); **Q-7** (ballpoint pen barrel); **Q-8** (Price Club card (T-2)); **Q-9- Q-10** (Cigarette butts) (See Bates #s 308 and 398).

11. There are a number of specimens about which a brief descriptive label is provided, based on which we cannot definitively identify the items. Again, there can be no understanding or comprehension of the results of any "reports" thus far provided without these answers.

e) With regard to the following items, please provide more descriptive information and/or pictures so that we can identify them:

Q-410 (tactical light); **Q-411** (laser light); **Q-417** (scope in sock); **Q-415** (rear sight); **Q-413** (ammo magazine); **Q-414.1** (debris); **Q-414.2** (?); **Q-129** (magazine from Bushmaster); **Q-129.1** (cartridge from magazine); **Q-129.2** (cartridge from magazine); **Q-130** (cartridge from Bushmaster); **Q-29** (cartridge case) (see Bates #s 309 and 310).

12. There are many items for which no results or reports have been produced. It is not known by the defense whether these specimens were submitted, and Mr. Malvo's DNA has been excluded as a possible contributor of DNA recovered, whether these specimens were submitted and no DNA could be obtained, whether the specimens were never submitted (and if so, why?), or otherwise.

f) With regard to the items below, please advise as to what results were obtained. If no results have been obtained, please advise why.

Q-172 (GPS System (2CS-05A));

Q-173 (Sony Vaio Laptop computer, model PCG-FX310, serial # 28338030-410965 (SW-34));

Q-173.1 (Toshiba 15.10 GB hard drive found in Q-173, model MK1517GAP, serial #

XINC5349T (SW-34));

Q-173.2 (Drive enclosure and adapter card found in Q-173, for housing Q-173.1 (SW-34);

Q-173.3 (DVD found in Q-173, title "Himalaya," with Blockbuster store number 91267 (SW-34);

Q-174 (Digital voice recorder (SW-52))

Q-175 (Electronic organizer (SW-54)). (Bates #s 315, 316)

g) With regard to the specimens below, please advise as to who obtained them, from where they were obtained, and whether there are any results relating to them.

If there are no results, please advise as to why no results have been obtained.

Q-387 (menu (no item #));

Q-391 (Book);

Q-393 (Book);

Q-409 (tennis shoe - right foot (item # 01));

Q-392 (cellular telephone) (See Bates #s 316 and 317);

Q-111 (Ziplock-type bag);

Q-112 (Ziplock-type bag);

Q-113 (Note OS-07));

Q-114 (Possible fecal matter);

Q-115 (Swab of possible fecal matter (OS-1A));

Q-116 (Tissue with stain (OS-02));

Q-117 (Ear plug (OS-3));

Q-118 (Button)

Q-119 (Goggles (OS-5));

Q-120 (Cigarette butt (OS-6));

Q-121 (Jacket (OS-10));

Q-122 (Sweat jacket (OS-11)) (See Bates #s 329 and 330);

Q-123 (Note(item No. A));

Q-124-125 (Two pieces of note (item No. N1));

Q126 (Note (item# 3657-01))

Q-141 through Q-167 (See Bates #s 363 and 364).

h) Please explain why there have been no results provided with regard to the following specimens:

Q-427 through Q-474 and Q-489 through Q-559 (See Bates #s 2077 through 2082)

Q-410, Q-411, Q-417 (Bates #s 310, 318)

Q-412 (Bates # 318)

Q-414 (Bates # 318)

Q-416 (Bates # 318)

Q-418 through Q-422 (Bates # 318)

Q-102 through Q-108 (Bates # 355)

Q-131 through Q-139 (Bates # 361)

Q-43 (Bates # 353)

Q-126 (Bates # 359)

Q-396 through Q-407 (Bates # 317)

K-29 through K-33 (Bates # 317)

Q-512 through Q-552 (Bates #s 2079, 2080, 2081)

Q-80 through Q-100 (Bates # 354)

Q-123 through Q-125 (Bates #s 338, 354)

Q-392 (Bates # 323)

i) Please explain why the following specimens have been resubmitted, and

please provide the results of the re-submission.

Q-31 through Q-36 (Bates # 2082).

13. Some questioned document (handwriting) "reports" have been received by defense counsel some time after July 10, 2003. Counsel has not been provided any information relating to these reports, to either identify the documents or explain from where they were obtained and when defense counsel will have access to them.

j) With regard to the following items, please inform us as to who obtained them, from where they were obtained and when they were obtained. Also, please advise counsel as to when they will receive access to the documents.

Q-558 & Q-559 (Bates #s 2120, 2121)

14. In addition to the reasons stated above, the information sought herein is essential in determining which witnesses need to be subpoenaed by defense counsel, some of which would be out of state and have a rapidly approaching deadline for filing.

WHEREFORE, the Accused respectfully requests that this court require the Commonwealth to provide the information sought in the inquiries from subparagraphs a) through j) above.

Respectfully submitted,

Lee Boyd Malvo
By Counsel

MARTIN, ARIF, PETROVICH & WALSH

By: _____

Michael S. Arif, VSB#20999

Mark J. Petrovich, VSB#36255

Thomas B. Walsh, VSB#36363

Counsel for Defendant

8001 Braddock Road, Suite 105

Springfield, VA 22151

Phone (703) 323-1200

Fax (703) 978-1040

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was hand delivered, this
15th day of September, 2003, to Robert F. Horan, Esquire, Commonwealth's
Attorney, 4110 Chain Bridge Road, #123, Fairfax, Virginia 22030.

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August 28, 2003

Robert F. Horan, Jr., Esquire
Raymond Morrogh, Esquire
Office of the Commonwealth Attorney, Fairfax County
4110 Chain Bridge Road
Fairfax, VA 22030

Re: Commonwealth v. Lee Boyd Malvo: DNA Evidence

Dear Bob and Ray:

Please be advised that we have received a series of documents, via discovery, which relate to DNA evidence. These include Bates stamp numbers: 000307 - 000362; 002077 - 002083; 000363 - 000371; and 000398 - 000403.

With regard to all of these "reports," there remain a number of issues and unanswered questions. I present the following for your review and request that you please provide the information that is missing:

1) There are many "swabbing" samples taken. Yet, there is no indication of from exactly where the "swabbings" were obtained. *With regard to specimens K-7.1, K-7.3, K-7.4, K-7.5 and K-7.6, please advise from precisely where on the Bushmaster these specimens originated (see Bates #s 307 and 308).*

With regard to specimens Q-423 (swabbing) and Q-424 (swabbing), please advise precisely where at the arrest scene these specimens were obtained (see Bates # 310).

2) There are a number of specimens about which a brief descriptive label is provided, based on which we cannot definitively identify the items. *With regard to the following items, please provide more descriptive information and/or pictures so that we can identify them:*

Q-410 (tactical light); Q-411 (laser light); Q-417 (scope in sock); Q-415 (rear sight); Q-413 (ammo magazine); Q-414.1 (debris); Q-414.2 (?); Q-129 (magazine from Bushmaster); Q-129.1 (cartridge from magazine); Q-129.2 (cartridge from magazine); Q-130 (cartridge from Bushmaster); Q-29 (cartridge case) (see Bates #s 309 and 310).

3) Specimens Q-2 (Swab (S-1)); Q-3 (Swab (S-2)); Q-4 (Cigarette butt (CN-8)); Q-5 (Cigarette butt); Q-6 (Cigarette butt); Q-7 (ballpoint pen barrel); Q-8 (Price Club card (T-2)); Q-9- Q-10 (Cigarette butts) were obtained from the Tasker School crime scene. *Please advise as to who recovered it, and precisely where at the scene was it found?* (See Bates #s 308 and 398).

4) According to the FBI Lab document dated February 5, 2003, "specimens" were received in the DNA Analysis Unit I on October 30, 2002, which specimens obviously were recovered from the arrest scene. Those include the following:

Q-172 (GPS System (2CS-05A));

Q-173 (Sony Vaio Laptop computer, model PCG-FX310, serial # 28338030-410965 (SW-34));

Q-173.1 (Toshiba 15.10 GB hard drive found in Q-173, model MK1517GAP, serial # XINC5349T (SW-34));

Q-173.2 (Drive enclosure and adapter card found in Q-173, for housing Q-173.1 (SW-34);

Q-173.3 (DVD found in Q-173, title "Himalaya," with Blockbuster store number 91267 (SW-34);

Q-174 (Digital voice recorder (SW-52))

Q-175 (Electronic organizer (SW-54)).

With regard to the above items, please advise as to what results were obtained. If no results have been obtained, please advise why?

5) *With regard to the specimens below, please advise as to who obtained them, from where they were obtained, and whether there are any results relating to them. If there are no results, please advise as to why no results have been obtained.*

Q-387 (menu (no item #));

Q-391 (Book);

Q-393 (Book);

Q-409 (tennis shoe - right foot (item # 01));

Q-392 (cellular telephone) (See Bates #s 316 and 317);

Q-111 (Ziplock-type bag);

Q-112 (Ziplock-type bag);

Q-113 (Note OS-07));

Q-114 (Possible fecal matter);

Q-115 (Swab of possible fecal matter (OS-1A));

Q-116 (Tissue with stain (OS-02));

Q-117 (Ear plug (OS-3));
Q-118 (Button)
Q-119 (Goggles (OS-5));
Q-120 (Cigarette butt (OS-6));
Q-121 (Jacket (OS-10));
Q-122 (Sweat jacket (OS-11)) (See Bates #s 329 and 330);

Q-123 (Note(item No. A));
Q-124-125 (Two pieces of note (item No. N1));
Q126 (Note (item# 3657-01))
Q-141 through Q-167 (see your descriptions) (See Bates #s 363 and 364).

6) With regard to specimens Q-427 through Q-474 and Q-489 through Q-559 (See Bates #s 2077 through 2082), *please explain why there have been no results provided?*

7) With regard to specimens Q-31 through Q-36, *please explain why they have been resubmitted, and please provide the results of the resubmission.*

It would be preferable to resolve these issues without having to file another motion, and thus, your cooperation is greatly appreciated. We look forward to hearing back from you shortly.

Sincerely

Michael S. Arif
For Craig S. Cooley

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August 28, 2003

Robert F. Horan, Jr., Esquire
Raymond Morrogh, Esquire
Office of the Commonwealth Attorney; Fairfax County
4110 Chain Bridge Road
Fairfax, VA 22030

Re: Commonwealth v. Lee Boyd Malvo; Questioned Documents Evidence

Dear Bob and Ray:

Please be advised that we have received two "reports" relating to "questioned document examinations" and dated July 10, 2003 and July 11, 2003, respectively. These reports relate to items Q-558, Q-559, K 37-40, Q-34, Q-35 and Q-36. We have no prior knowledge of these items and need to know who obtained them, from where they were obtained and when they were obtained. Further, we need to know how and when they will be made available to us for our review and analysis by our expert.

In the interest in avoiding the filing of another motion, we would appreciate receiving this information within ten days.

Sincerely

Michael S. Arif
For Craig S. Cooley